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# 3.IMPACT OF THE LICENSING ACT 2003

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DISCUSSION

# GENERAL FINDINGS

- 3.1** The Forum's role has proved an extremely challenging and demanding one, taking in the transition to a new system of licensing for live music, the removal of the 'two-in-a-bar' rule, which for some has been a highly contentious issue, and working with our partners to observe and monitor the introduction of new legislation.
- 3.2** Throughout this process the Forum has worked closely with the licensed trade, the music industry, national and local governments, commercial and not-for-profit sectors and a wide variety of other individuals and organisations. Where possible we have investigated each of the various issues that have been brought to our attention, while at the same time gathering our own evidence to help evaluate any potential impact of the new regulations. In assessing the assembled evidence, members of the Forum, both individually and collectively, have been able to draw on a considerable body of experience and expertise in the live music area.
- 3.3** Like many forms of change the Licensing Act was greeted in some areas with a great deal of uncertainty and concern. At times we found it necessary to divert our limited resources from our objective of the day to respond to some rather sensationalist speculation, all of which upon investigation proved to be unfounded. On occasion a great deal of time, effort and resolve was required by Forum members, to help separate fact from fiction.

## Case Study

Early in 2006 *The Times* ran a story under the by-line "Under new rules landlords must obtain a licence, costing up to £1,000, for any live performance." This story caused widespread alarm throughout the music industry to such an extent that we were contacted by the board of one multinational record company wishing to express their deep anxiety. After several days of discussion with the journalist concerned, it transpired that he had no evidence to substantiate either that any premises had been charged any extra fee for staging live music, or indeed the £1,000 fee quoted in the original article.

## Case Study

In January 2006, *The Daily Telegraph* ran a story under the headline "Live music hit by licensing changes". This story quoted a musician who stated that he had lost work in a local high street restaurant chain as a direct result of difficulties with the new licensing process. We spoke to the duty manager of the branch concerned who refuted the story, stating that his decision not to include live music in his licence application was purely commercial and unrelated in any way to the Licensing Act.

- 3.4** There has been a very large number of occasions when Forum members have had to deal with this kind of situation. In each case, and without exception, local government representatives on the Forum have been unwavering in their help and support, facilitating direct contact with local licensing officers, licensing sub-committees and local councillors, and providing us with access to the information we required so that the Forum as a whole could access the true nature and extent of any issues.
- 3.5** For the last few years Forum members, collectively and individually, have been extensively engaged in this process. This, for example, included the review of applications and objections received by individual local authorities examining the minutes of licensing hearings and noting their outcomes. Forum members have also undertaken their own independent research, the results of which were made available to the wider Forum. The Musicians' Union and the British Beer and Pub Association were particularly active in this area. We have also worked closely with external trade organisations, licensing officers, concert promoters, booking agents, venue owners and many others who had an interest in the introduction of the Act, encouraging each to provide us with their own experiences of the legislation.

#### Case Study

We asked booking agents to contact directly those promoters and venue owners they deal with as part of the normal daily business activities and to report back independently examples of where venue operators felt the Act might be having an impact. We had one response, from a venue in the north of England, asking if we might be able to assist with a parking problem they were having.

#### Case Study

We worked with representatives of the largest licensing trade publication *The Publican* who, on a number of occasions, invited the industry to contact them directly if they felt they had been impacted upon adversely by the new legislation, so that once again the magazine could report back independently to the Forum. To date we have not received a single reply.

- 3.6 All of this work was further supported by several strands of national research undertaken by DCMS, to which Forum members had full input and oversight.
- 3.7 For example, the latest round of national research undertaken by the Department<sup>17</sup> was developed, at Forum members' request, to focus specifically on smaller licensed premises (with a capacity of less than 500 people), so that we could better understand their experiences throughout the implementation of the Act, and licensees' experience of the application process in particular.
- 3.8 We have visited many areas throughout England and Wales, held seminars for industry and local government, given countless speeches, guidance and advice, held meetings and maintained regular contacts, all in an effort to ensure that as many people and organisations as possible had an opportunity to have an input into the process.
- 3.9 While there have been many changes brought about by the introduction of the Licensing Act 2003, the overall conclusion of the Live Music Forum, based on all the evidence we currently have before us, is that the Licensing Act has had a broadly neutral effect on the provision of live music.
- 3.10 However, it is also true to say that the Licensing Act has not led to the promised increase in live music. On a number of occasions, Ministers publicly stated that the changes brought about by the Act would provide significant growth for live music. Kim Howells, the then DCMS Minister, speaking before the Licensing Bill Standing Committee on 20 May 2003, stated: "It might be helpful if I also set out what the two-in-a-bar rule is, what we are putting in its place and why that will result in a vast increase in the opportunities for artists of all types – not just one or two musicians – to perform." And Lord McIntosh of Haringey, the then DCMS Spokesperson in the House of Lords, told the House on 26 Nov 2002: "My view is that there will be an explosion of live music as a result of removing the discriminatory two-in-a-bar provision." Members of the Live Music Forum remain unconvinced by these comments and view with some scepticism any belief that the Licensing Act 2003 will in itself lead to a growth in live music.
- 3.11 To address a particular concern which has been frequently raised with us, we have found nothing to indicate, nor have we been presented with anything to substantiate, that any one particular type or style of live music has been affected more than any other.
- 3.12 While our research does indicate that a very small number of smaller venues have ceased to provide live music as a direct result of the Act, this effect has largely been offset by new venues which have taken advantage of the legislation and now provide live music for the first time.

17. [http://www.culture.gov.uk/Reference\\_library/Research/research\\_by\\_dcms/live\\_music\\_exec\\_summary.htm](http://www.culture.gov.uk/Reference_library/Research/research_by_dcms/live_music_exec_summary.htm)

- 3.13** What is clear however – and this is something we feel we need to underline – is that the vast majority of local authorities have acted in a way that can only be described as even-handed and professional, on occasion having to balance some very conflicting voices in some rather difficult circumstances. They should be commended for their sensible and pragmatic approach.
- 3.14** But that is not to suggest that there have not been, and continue to be, some issues that need to be addressed. It is apparent that a small number of licensing authorities have taken a radically different approach from most others when dealing with situations which were very similar if not identical in nature, and we would ask Ministers to consider the issues raised by this very carefully.
- 3.15** The Act has in many ways provided some of the greater opportunities which Government had hoped for:
- the Register of Public Spaces, an idea developed by the DCMS Licensing Team, has been very successful. Now available online it includes the details of over 150 local authorities which have licensed their own public areas (over 500 individual sites) for the performance of live music;
  - the rehearsal space pilot projects, a direct result of the Secretary of State's recommendation that local authorities license their own property, has proved incredibly successful with, and is very well supported by, young local musicians and performers;
  - we have had organisers of small scale local festivals tell us how they felt the new legislation had benefited their events. Temporary Event Notices, for example, have provided greater access to venues previously unavailable.

### Case Study

The Tenterden Folk Festival is held annually over three days in October. It has been running for 12 years and is a popular local event regularly attracting up to 10,000 spectators. As a direct result of changes introduced by the Licensing Act, the 2006 event was able to make better use of several local venues and to use other venues that had not been available prior to the introduction of the Act.

### Case Study

Venue owners and promoters have told us how the Act has made them look in a very different way at how they operate, and has led them to introduce changes that will benefit their businesses – and how the Act has helped them create a much more constructive and supportive working relationship with local authorities and their staff.

### Case Study

Two senior executives from commercially successful live music companies made the case to the Forum that the application process had the knock-on effect of making them take a more strategic overview of how they operated their business as a whole, an exercise which they felt would benefit them, their business and their customers.

### Case Study

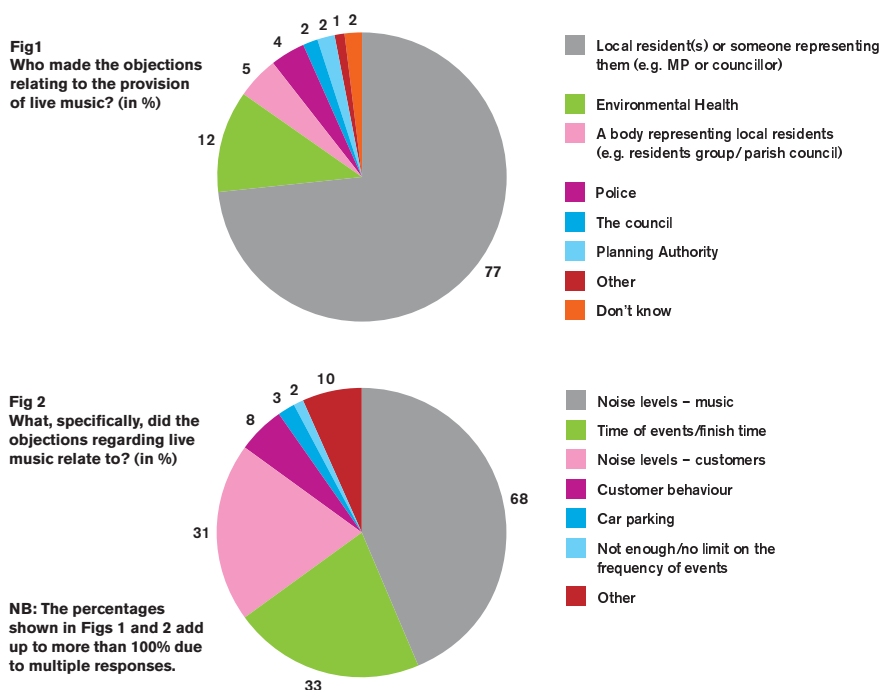
A promoter at one of London's most successful and longest running pub venues wrote to the Forum to thank them for their work in promoting live music and to outline his experiences of running a venue under the new Act. He said the new Act had had the effect of creating a closer relationship between the venue, the local authority and the police. Rather than having an 'us and them' relationship, the new Act has not only allowed the venue to open later but had also enabled extra bands to perform.

- 3.16** As highlighted by the Tenterden Folk Festival, the new system of Temporary Event Notices has proved to be extremely popular and successful. During the 12 months following the introduction of the new legislation, over 100,000 TENs were issued by local authorities. The applicants ranged from small community groups organising their own events, to licensed premises applying for more flexible opening hours during holiday periods, to creative businesses. We are aware, for example, of small independent record companies using the new system of TENs to organise events to help showcase new developing artists and performers.
- 3.17** It would appear that in some areas concern has been expressed about the flexibility provided by TENs. We are confident that Ministers will always attempt to strike the right balance between any concerns that might be raised and the obvious wide-ranging benefits which the new flexible system of TENs would appear to have brought to many communities. As this report discusses in some detail, concern and reality are not always the same thing. The Forum would not therefore like to see any further restrictions to the current 'light-touch' approach when TENs are issued.
- 3.18** The Licensing Act 2003 has therefore not brought about the devastation which some had feared and it would be irresponsible to suggest otherwise.
- 3.19** We hope that what follows will not in any way reflect upon the majority of local authorities which have been very supportive towards the staging of live music; indeed, because of their efforts there is much more reason for encouragement.
- 3.20** There are however several issues we have identified which we feel are serious enough to warrant further investigation and discussion, and which we would ask Ministers to consider very carefully.

# OBJECTIVES OF THE LICENSING ACT 2003

## Public Nuisance from Noise

**3.21** The majority of concern regarding live music seems to have centred on the possibility that noise nuisance might be created by licensed premises opening for longer hours after the introduction of the Act. It is this factor which also seems to have been the main driving force of objections to live music, especially from local residents. As the 2006 MORI survey indicates (see Figs 1 and 2), 77% of all objections to applications for live music came from local residents or their representatives, with 68% of those objections specifically relating to concerns about the noise level of music. Other areas of concern were also expressed, including the finishing time of events (33%) and noise levels from customers (31%) and noise levels from customers (31%).



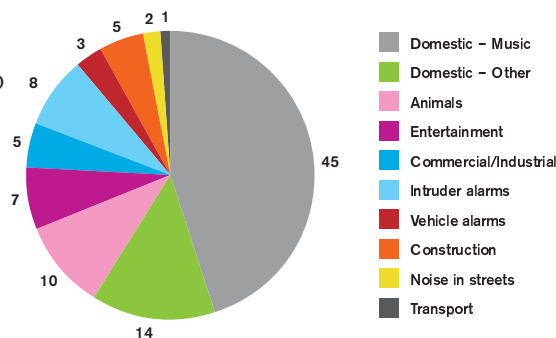
**3.22** While historically there may have been the occasional issue involving noise from premises providing live music, this would not appear to have been particularly widespread and we feel it important that this is put into a proper context.

**3.23** For the last 16 years local authorities have had a statutory obligation, under the Environmental Protection Act 1990 (EPA), to safeguard local residents from any form of noise nuisance. This would include noise from live music. The EPA also provides a mechanism for individuals, rather than local authorities, to take private action against any potential noise source.<sup>18</sup>

18. Section 82 Environmental Protection Act 1990

- 3.24** Within local authorities, the traditional mechanism for dealing with a statutory noise nuisance is the issuing of a Noise Abatement Notice, requiring that the noise should cease or be abated within a specified timescale. The Notice may include instructions to the venue to undertake certain measures to control the problem. This might, for example, include the fitting of double glazing, air conditioning or noise limiters. Any commercial premises found guilty of not complying with a Noise Abatement Notice can be fined up to a maximum of £20,000.
- 3.25** Pinpointing the exact nature of any potential impact of noise resulting from live music has proved to be something of a challenge. National data on noise complaints received by local authorities is collated by the Chartered Institute of Environmental Health. However, this information is provided voluntarily by local authorities and traditionally the focus of data collection has centred on premise-type rather than the noise source. It has therefore not been possible to isolate those complaints received by local authorities specifically relating to live music as the data would appear not to exist. What is used is a generic category called ‘Entertainment Noise from Commercial Premises’; this would include complaints relating to both live and recorded music.
- 3.26** By way of example, Fig 3 represents the noise-related complaints record of one local authority which was presented to a licensing sub-committee meeting in 2006. It will be clear from this that noise complaints from ‘Entertainment’ venues amounted to just 7% of all noise complaints received during the period March 2005 to April 2006.
- 3.27** As the ‘Entertainment’ category includes complaints about both recorded and live music, and as there is a lack of any other national data, we feel it reasonable to attribute an equal share of the 7% figure to each potential noise source. This assumption would infer that within this local authority’s area there were twice as many noise complaints about intruder alarms than about live music, almost three times more complaints about animals, and almost 13 times more noise complaints about music which was domestic in nature (a next door neighbour playing a stereo system too loudly, for example).

**Fig 3**  
Breakdown of noise complaints by type (in %) April 2005 – March 2006



- 3.28** Environmental Health professionals have confirmed to us that this local authority's breakdown of complaints about noise would not be an unreasonable representation for an average local area; in fact there is a view that the approach to attributing noise sources outlined in paragraph 3.27 would actually be overly conservative. The Taylor Review commissioned by the Department for the Environment, Food and Rural Affairs (DEFRA) in 2006, looked specifically at the use of Noise Abatement Notices by local authorities and concluded that: "In many local authorities, almost all the complaints are about (music from) domestic premises, and it is typical for a local authority to have about 90% of their complaints about this source".<sup>19</sup>
- 3.29** The 2001 Travers Report *Managing the Balance: quality of life in the centre of London*,<sup>20</sup> commissioned by the Westminster Property Owners Association, further highlights that for local residents, noise from places of entertainment ranks considerably below other noise sources affecting their quality of life.
- 3.30** It is also important to remember that the results of our 2004 baseline study indicated that during the survey period there were approximately 1.7 million live music events throughout England and Wales, and that approximately 15% of all premises providing live music had no formal licence. We would question what percentage of those events gave rise to any possible noise nuisance. Based on what we believe to be the pattern of noise complaints received by local authorities, it would appear that there is little evidence to support the idea that live music is, or has traditionally been, a widespread source of public nuisance. What evidence we have collated clearly indicates that there is a larger number of other noise-related issues which are of substantially greater concern to local residents.
- 3.31** The recently introduced Clean Neighbourhoods and Environment Act 2005,<sup>21</sup> will also provide local authorities with an additional power to issue an on-the-spot fine to any licensed premises emitting noise that exceeds the permitted level between the hours of 11pm and 7am.
- 3.32** Based on all of this evidence – local authority data, our own research, three independent reports and confirmation from Environmental Health professionals – one might question exactly why so much time and effort has been expended in recent years passing legislation dealing with a problem that would appear not to be particularly widespread or, in a worst case scenario, would appear to have a rather minimal impact.

19. <http://www.defra.gov.uk/environment/noise/research/abatement/noise-abatement060731.pdf>

20. <http://www.wpoa.co.uk>

21. Clean Neighbourhoods Act

## Crime and Disorder

- 3.33** Not unlike the issue surrounding noise and ‘public nuisance’ we have also been unable to find any evidence to support the idea that live music is a potentially greater widespread source of ‘crime and disorder’ than other forms of licensed activities. In fact the evidence we have uncovered clearly indicates that where there is live music there would appear to be less crime.<sup>22</sup> This may be further illustrated by the fact that during the course of our work we became aware of one local police officer who appeared to have developed a pattern of objecting to applications for live music on the grounds of crime and disorder. We wrote to the officer concerned asking for clarification of the evidence he might have had to substantiate that premises providing live music posed a greater risk than other types of activities. His reply, while lengthy, neglected to answer the specific question we had asked.
- 3.34** We have also become aware of a letter sent by the then President of the Association of Chief Police Officers (ACPO) to the Secretary of State for the Department for Culture, Media and Sport, Tessa Jowell, on the 2 July 2003 regarding live music and its relationship with crime and disorder.
- 3.35** The following day, during the course of a debate about the then Licensing Bill, extracts from this letter were extensively quoted on the floor of the House of Lords by the then DCMS Lords Spokesperson, Lord McIntosh of Haringey.<sup>23</sup> In particular the following extract was read to Members of the House, “Live music always acts as a magnet in whatever community it is being played. It brings people from outside that community and having no connection locally behave in a way that is inappropriate, criminal and disorderly”.
- 3.36** We wrote to the current President of ACPO asking him to share with Forum members any information or material which ACPO might be in possession of which would have enabled his predecessor to put forward the viewpoint, on behalf of ACPO, that audiences who attend live music events are prone to “behave in a way that is inappropriate, criminal and disorderly”.
- 3.37** In response ACPO has indicated that it would not be reasonable to suggest, nor would there be any evidence to confirm, that all audiences who attend live music events are prone to behave in a manner that could be considered inappropriate or indeed criminal. However, ACPO did restate its belief that live music can act as a magnet attracting people to listen to it and that, sadly, there are a few occasions where people do act in an inappropriate, criminal or disorderly manner.

22. Minutes of Glastonbury PEL application hearing with Mendip District Council, January 2005

23. <http://www.publications.parliament.uk/pa/ld200203/ldhansrd/vo030703/index/30703-x.htm#contents>

- 3.38 Quite what these few occasions are would appear to be rather unclear. As indicated in other sections of this report, our 2004 baseline study has indicated that during the survey period there were approximately 1.7 million live music events throughout England and Wales. As further indicated in paragraph 2.14, one ticket outlet alone sold 15 million tickets for live music events during the course of 2006. Mintel's 2002 report *Student Lifestyles UK*, indicates that 44% of all students regularly attend live music events (there are currently 2.2 million students in the UK according to the NUS), while Oxfam's (Oxfam) music festival survey in 2006 indicated that 37% of the population attend at least one gig every month. The Arts Council of Wales in their 2005 study *Music: attendance and participation*, also revealed that in Wales: 13% of all adults attend at least one classical music event per year; 11% of adults at least one Folk music event per year; 10% of adults at least one Jazz music event per year; and 39% of all adults living in Wales attend at least one Rock or Pop event per year. This latter figure further increases to 56% of all 16 to 24 year olds.
- 3.39 Oxfam's music survey further highlighted that "Just 20% of Britons rarely or never attend gigs". The inference here of course is that 80% of the UK's total population have experienced live music. It might therefore be reasonable to question just how many of these events have ever given rise to the kind of concerns expressed by ACPO or exactly how many, of what would appear to be a quite considerable percentage of the population who attend live music events, might ever behave in a manner that could be described as "inappropriate, criminal and disorderly". In context, and in the Forum's view, that number would appear to be very, very small indeed. Perhaps occasion once again to reflect upon the Hampton Review's approach to risk-based regulation.

## Public Safety and Fire Risks

- 3.40 The Regulatory Reform (Fire Safety) Order 2005 (RRO), now places a direct responsibility on each licensed premises to carry out a fire risk assessment, which in turn must be kept open and available for inspection at all times by local fire officers. We have reason to believe that for all practical intents and purposes the RRO now negates most, if not all, of the public safety requirements of the Licensing Act in relation to Fire Safety.

## **RECOMMENDATION**

- (i) As part of the Section 182 Guidance review currently under way, and any follow-up work, the opportunity is taken to help clarify for local authorities the exact nature and extent of the relationship between the Licensing Act and the Regulatory Reform Order and the requirement not to impose licensing conditions where the latter applies.

# REPRESENTATIONS AND LICENSING HEARINGS

## Hearings

- 3.41 From our work it would appear that many local authority licensing sub-committees have had to deal with an almost automatic assumption on the part of some people, that if there was going to be live music it was, without question, going to give rise to a noise nuisance. As noted above, in the 2006 MORI research 68% of the objections to live music applications received from local residents specifically related to concerns over the noise levels of the music. Live music it would appear can also trigger some very strong opinions, not always favourable nor, as it transpires, particularly well informed.
- 3.42 The recent press coverage regarding the cancellation of concerts at Kenwood House in North London provides an insight to this issue. In response to the cancellation a prominent London Assembly member was quoted in the local media as saying: "It's excellent news, marvellous. It is their own fault. They are an absolutely disgraceful organisation for what they have done to Kenwood. They ruined the concerts by making them tacky." We believe the reference to "tacky" related to the previous year when, on a few occasions, artists such as Katie Melua and Art Garfunkel replaced the more traditional orchestral event. A similar comment was also attributed to the Chairman of a local residents association.<sup>24</sup>
- 3.43 MCM Research Ltd in their report *Implications for noise disturbance arising from the liberalisation of licensing laws*,<sup>25</sup> quoted one local Environmental Health Officer as saying: "Persons who enjoyed a particular type of music were less likely to construe it as a nuisance than those who did not share their preferences." This was evidenced by the fact that in the previous year he had received a complaint about an open air event from a person living about half a mile away. The complainant had stated that she was being subjected to "pop music". Other events at the same venue, with the same loudness but a different type of music, attracted no complaints.
- 3.44 On occasion it would appear that some licensing sub-committees have also struggled to strike a balance between some very vocal emotions and viewpoints.

24. Ham & High 22 Feb 2007

25. MCM Research Ltd report *Implications for noise disturbance arising from the liberalisation of licensing laws*, commissioned by the Department for Environment, Food and Rural Affairs October 2003.



- 3.45 The minutes from one local authority licensing sub-committee in the east of England illustrates the point. A local public house had included provision for live music in its application. The Licensing Officer presenting his report advised the committee that there had been no representations from any 'Responsible Authorities', including Environmental Health; there were however 15 objections to the application from local residents – these included: antisocial behaviour, opening hours, and crime and disorder. The gentleman speaking on behalf of local residents stated that, "Existing problems would also be exacerbated if musical entertainment were to be permitted". From what we can see nothing was presented to substantiate the view that live music had been the cause of any of the previous problems faced by local residents – people being noisy in the street, taxi horns – or indeed that live music was capable of exacerbating in any way any of those problems in the future. During the course of the meeting, Committee Members were also reminded that there had been no objections to the application from Environmental Health, and the local authority's Principal Solicitor stated that, in the first instance, issues such as noise were best "dealt with under other legislation and it was not for the Sub-Committee to duplicate this function." Two of the three Committee members however took the view that "live music would be unacceptable to local residents". The application for live music was refused.
- 3.46 The minutes from the following week's main licensing committee meeting provide further insight. One Councillor stated that he had observed the proceedings at the licensing hearing relating to the application made for live music provision, and was very concerned to note that some of the advice offered by the Principal Solicitor (relating to live music) had been ignored. He further commented "Members had to be prepared to be disliked by one or other of the parties at the hearing".
- 3.47 At one licensing hearing witnessed by a Forum member, one resident, when speaking on behalf of other local objectors, acknowledged that although he lived but a few doors away from the public house, he had no knowledge that the local folk club had been meeting in a room above the pub for several years. Nor was he aware that there had been a disco in the pub the previous weekend – he had simply not heard it. The licensing committee placed a condition on the licence prohibiting live music in the upstairs room (where the folk club had been meeting) and limited live music in the main bar to no more than two events per month.
- 3.48 It should also be noted, as indicated by the 2006 MORI survey, self-imposing conditions on an application for live music did little, if indeed anything, to lessen the likelihood of receiving objections from local residents.

## Representations

- 3.49** These issues have been further heightened by the process by which ‘Interested Parties’ can make representations. The Act allows ‘Interested Parties’ – local residents and businesses living and operating within the “vicinity”<sup>26</sup> of premises – to raise any views they wish in respect of a licence application, as long as those views are “relevant” within the meaning of the Act (this means they have to be about the likely effect of the grant of the licence on the promotion of the licensing objectives). In theory a representation can be either in favour of or in opposition to that application.
- 3.50** Outwardly this might appear to be an appropriate mechanism. However, in practicable terms it is unworkable, at least for those who wish to offer support in favour of an application.
- 3.51** In reality the very word ‘representation’, whether intended or not, is interpreted as an objection, opposition to or an opportunity to discuss the negative aspects of an application. Many local authority websites, for example, contain a link “Making an objection”, with no alternative presented. Indeed, guidance for Interested Parties issued by the Department does not once indicate that a representation can be made in favour of an application. Once again the tone of this guidance is an invitation to discuss any potentially negative aspects of an application. LACORS, on the other hand has presented this information on its website since December 2006, when the issue was first brought to its attention. Through all of our efforts we have only been able to identify one or two isolated cases where it was made clear that a representation could be in favour of an application, indicative perhaps of the fact that we have only uncovered a single example where local residents did make a representation in favour of an application for live music.



26. The Licensing Act does not provide a definition of “vicinity”.

- 3.52 This situation is further exacerbated by the fact that it is a requirement of the legislation that all representations must be framed within one or more of the four licensing objectives: the prevention of crime and disorder; public safety; the prevention of public nuisance; and the protection of children from harm.
- 3.53 Quite how a member of the general public, even in the unlikely event that they have managed to become aware that they are in a position to do so, can be expected to frame an argument in support of an application within the context of the objectives of the Licensing Act, is unclear – a Herculean task even for a seasoned licensing professional.
- 3.54 We do not feel it reasonable that live music should have to bear the brunt of what, on occasion, would appear to be nothing more than an unsubstantiated, uninformed, predetermined prejudice. Nor do we feel that such viewpoints should have the opportunity or ability to impact upon the provision of live music. Unfortunately, as we will discuss later, in some areas that would appear not to have been the case.
- 3.55 If Ministers are intent upon ensuring that the system of representations is fair and equitable to all, then they need to address the formidable hurdles faced by those wishing to speak in favour of an application for live music, and equally to place a responsibility on those raising an objection to substantiate any comments they might have.

## **RECOMMENDATION**

(ii) The Guidance issued to licensing authorities and police under Section 182 of the Licensing Act 2003, and any guidance issued to Interested Parties, is amended with immediate effect to make clear that any representations made in respect of an application for live music must be substantiated and must be evidentially based.

(iii) Greater effort is given to ensuring that all Interested Parties are aware that they can speak in favour of an application for live music and how that might be done.

(iv) A mechanism is created to allow a representation in favour of an application for live music to be framed in a way that it can be justified by a member of the general public. By way of example, reference and a link to this report should be made in any guidance issued by DCMS for Interested Parties with specific reference to the sections examining the licensing objectives. Similarly, reference should be made to The Civic Trust's report *Nightvision, Town Centres for All*<sup>7</sup>, which examines good practice in managing and developing evening and night time economies with a stated aim of ensuring "town centres for all".

## Incidental Music

**3.56 The Licensing Act provides an exemption for live music which is incidental to other activities that are in themselves not licensable. However, the legislation does not provide any further definition of what might or might not be ‘incidental music’. This lack of clarity would appear to have had a far reaching and rather negative impact. We are aware, for example, of a cancelled village festival, a local folk club comprised predominately of elderly gentlemen prevented from holding their annual Day of Song, a brass band informed that they can only play songs of a “religious nature” and Mummers having to reduce the number of pubs they perform in at Christmas from 25 to seven. It would seem likely that the £1,000 the Mummers eventually did raise for their local Air Ambulance might have been greatly increased had they been allowed to perform in all of their traditional venues, as they have done for the 600 years prior to the introduction of the Licensing Act.**

### Case Study

A West Country brass band originally founded in the late 1850s, and which as a registered charity traditionally use its public performances, typically in the town centre during the Christmas period, to raise funds for local good causes. During the course of 2006 the band was informed by its local authority that unless any future performances were to include only material of a “religious nature”, it would no longer be exempt from licensing and would require a Temporary Event Notice for each performance. As the Chairman of the brass band has explained to us, the cost of a TEN frequently outweighs the amount of money collected, and as a result the band has now had to curtail the number of performances it undertakes.

In response to the predicament this local authority found itself in, and in an effort “To avoid giving the impression in the media that community cohesion might be threatened by bureaucracy”, the authority has written to all local town and parish councils within its area asking them to apply for Premises Licences for any public land they might own. The full Council, at a meeting in November 2006, also voted to extend its interpretation of “community buildings”, to include any publicly owned land, so that local and parish councils would then be exempt from any licensing application or annual fees.

In a neighbouring yet different local authority, a male voice choir has had a similar experience. For the last 50 years the choir has undertaken a number of summer performances at the local quay side to entertain passing tourists and once again to raise money for local good causes. The Choir has been informed that unless it now only performs songs of a “religious nature”, it also will require a TEN. We understand the choir has now written to its local authority to say that, regrettably, the four performances which it had planned for this summer will have to be cancelled.

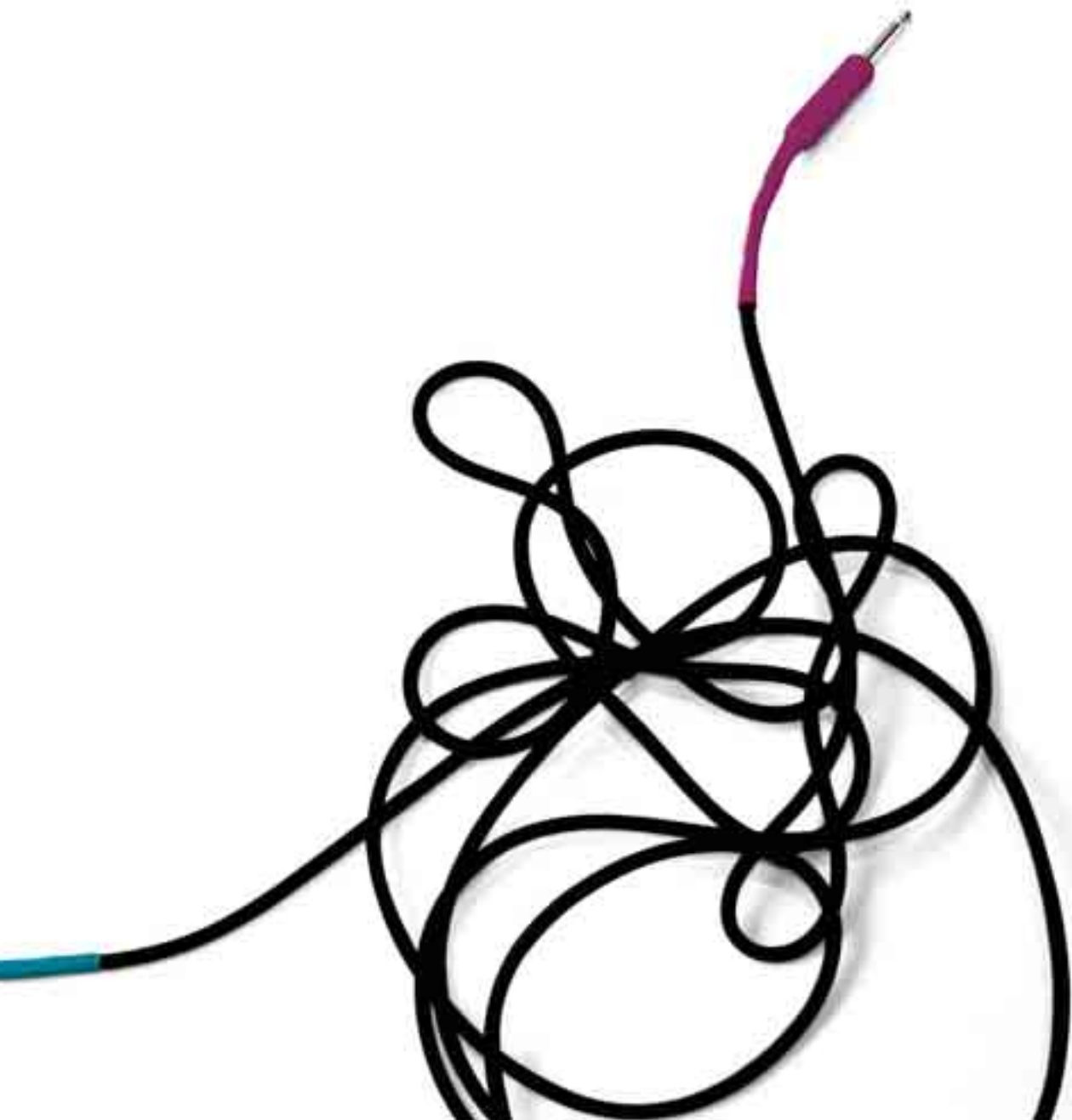
No alcohol is provided at any of these events.



### Case Study

An Oxfam bookshop had advertised in a local paper that it was to hold an evening of poetry reading with musical accompaniment. The evening was to consist of four local poets reading poetry while a local musician played the didgeridoo to provide an “atmospheric background”; the shop seats 25 people. From what we understand the local police licensing officer contacted the local authority which then informed the shop manager that the event could not take place unless a TEN was issued. The evening of poetry reading and didgeridoo playing was postponed until the required paperwork was put in place.

No alcohol was to be sold at this event.



### Case Study

A small café in a north east of England coastal town which does not serve alcohol, nor is it engaged in any other licensable activities. Traditionally, on one occasion per week, it would provide live music as an accompaniment to lunch. Due to the size of the café this would normally be provided by no more than one or two musicians. Since the introduction of the Act this activity has ceased as the café owner feels he cannot commercially justify the time and expense needed to complete the full application process simply to provide, as he sees it, limited live music for no more than one hour per week at lunch time.

No alcohol was to be sold at these events.

### Case Study

A local folk club comprised of a group of elderly gentlemen would meet once a year in a small room above a pub in the English countryside. In exchange for the £25 fee for use of the room, the landlady would provide sandwiches at lunch time and the folk club would spend the day with anyone who wished to attend singing, unaccompanied, old English folk songs in the upstairs room. The pub does not provide live music at any other time and is not licensed to do so. This event did not take place in 2006 as the landlady was informed that she would be required to apply for a variation to her Premises Licence.

### Case Study

On the 18 February 2003, DCMS issued a press release on behalf of the then Licensing Minister Kim Howells.<sup>28</sup> This announced “a package of measures to allay fears about the Licensing Bill’s impact on live music”, one of which was a leaflet entitled “the answer to 20 myths about public entertainment and the Licensing Bill”, designed to “set the record straight on some of the most pervasive myths being circulated about the Bill”. In response to the “myth” that a licence would be required every time someone plays a musical instrument, this leaflet clearly states that: “Busking will NOT be licensable”. It would appear however that not everyone shares this viewpoint. One local authority website provides the following interpretation: “Busking in a public place requires either a Premises Licence or a Temporary Event Notice under the Licensing Act 2003”, and a second local authority in response to a question from a local resident stated: “If you wanted to busk in areas not currently covered by a premises licence then currently you would have to apply for a premises licence yourself.”

28. [http://www.culture.gov.uk/Reference\\_library/Press\\_notices/archive\\_2003/dcms20\\_2003.htm](http://www.culture.gov.uk/Reference_library/Press_notices/archive_2003/dcms20_2003.htm)

- 3.57** In contrast to the above case studies which restrict opportunities for live music, the Forum would like to highlight the following example from the City of London Corporation, which shows how a common-sense approach worked for the benefit of all those involved.

#### Case Study

Early in 2006, the City of London Corporation was approached by St Barts Hospital and a charity, Vital Arts, which wished to provide a series of live music events, two concerts per week, through the summer in the public areas of the hospital; music was to be performed on 25 of the wards. The City of London Corporation stated that it felt there was a “Strong argument for the music being incidental to the provision of clinical treatment”. And that the music as outlined to them would be such so as to not require a licence under the provisions of the Act.

- 3.58** The Forum feels that the approach taken in this case was particularly insightful, sensible and pragmatic.

#### Case Study

Newcastle City Council took the view that music, singing and dancing performed before the start of “fun run” events such as the Great North Run and the Race for Life were incidental to the running activity and are not therefore licensable. It also took a similar approach to some processions through the City where singing and dancing have taken place and where the end of the procession resulted in a licensable event taking place in the City.

- 3.59** As our previous case studies illustrate, there would appear to be some local Licensing Officers who are rather wary of offering their own interpretation of what might or might not be ‘incidental music’. As a result, and perhaps not unreasonably, these officers invariably err on the side of caution and insist upon a formal licence application.
- 3.60** We are also aware that it has been the Department’s position that it is now a matter for the Courts to define what is or is not incidental music. We find this viewpoint very unsatisfactory. It is clear that there has already been a great number of occasions when what was due to take place would have posed little, if indeed any, threat at all to the objectives of the Licensing Act.
- 3.61** We fail to understand how it could continue to be acceptable to demand that local Licensing Officers should be placed in a position of having to second guess what might or what might not have been Government’s intentions.

- 3.62** And while it might be argued that this lack of definition provides flexibility for the operator, it should be remembered that any difference of opinion with the licensing authority as to whether or not music is incidental, can result in the review of the Premises Licence or criminal charges for breach of the Act.
- 3.63** From the evidence we have before us it is apparent that most, if not all, of those impacted upon most by this lack of clarity are invariably the participants and organisers of very local, very small-scale events. We do not feel that it is an appropriate course of action to now insist that the proprietor of a small café, the elderly gentlemen who comprise a local folk club, the part-time members of a choir or the manager of a local charity shop should be placed in a position to have to seek recourse through the courts, either at appeal or Judicial Review, simply to clarify whether or not they may or may not have been breaking the law.
- 3.64** We also note with some interest the Ministry of Justice's current consultation paper<sup>29</sup> which proposes to increase the Court fees payable for lodging an appeal, from the current £25 to £400. We believe the fee is also non-refundable even in the event of an appeal being upheld.
- 3.65** The Better Regulation Commission made similar comments when it reported on the implementation of the Licensing Act and stated, in relation to incidental music: "We find it alarming that the Government is unable to clarify its intentions and explain to those affected by its own legislation what they are required to do."<sup>30</sup> It went on to observe that the Review of the Section 182 Guidance (currently under way at the time of going to print) should address this "major area of uncertainty", and concluded that: "Should changes need to be made to legislation to resolve this, then they should be initiated immediately."
- 3.66** While the Department has included amendments to the definition of incidental music in the current review of the Section 182 Guidance to local authorities, for reasons discussed elsewhere in this report we do not feel that this measure alone will provide the necessary clarity, or more importantly, the certainty needed by local authorities, the licensed trade or anyone else who wishes to comply with the law.

29. <http://www.justice.gov.uk/docs/cp0507.pdf>

30. Implementation of the Licensing Act 2003, April 2006  
[http://www.brc.gov.uk/downloads/pdf/implementation\\_licencing\\_act.pdf](http://www.brc.gov.uk/downloads/pdf/implementation_licencing_act.pdf)

- 3.67** In fact we were rather surprised to see that the suggested amendments to the Guidance includes, as part of the test as to whether music is 'incidental', the question: "Does the volume of the music disrupt or predominate over other activities?" We fail to understand how the level or volume of music has any bearing on whether or not music is incidental. Using the example cited in section 3.21 of the proposed Guidance: "An orchestra may provide incidental music at a large exhibition", would seem a sensible approach. However, as in the example of St Barts Hospital, if the volume of that orchestra were to predominate for a short period over the other activities taking place would it now not be considered incidental? Who would measure this, and how could such a measurement be made after the event?
- 3.68** We have previously discussed the comparative impact of noise from premises providing live music and 'public nuisance' in some detail at paragraphs 3.21-3.32 of this report.
- 3.69** While based on technicalities it would appear to be true that some of these kinds of activities did require licensing prior to the introduction of the Licensing Act: Mumming and the musical accompaniment there of, we are told, was licensable under the Theatres Act 1968, and religious music is also not exempt from the requirements of the Licensing Act, rather the exemption applies to places of public religious worship. Fortunately, however, it would appear that society has exercised a great deal of common sense and we are currently not aware that any charges have ever been brought against Mummers for breaching the Theatres Act.
- 3.70** We also note the Government's recent adoption of the Hampton Review (see paragraph 1.14) which concluded that risk assessment "Should [now] be the basis for all regulators' enforcement programmes and that any failure to use risk assessment comprehensively and consistently means that resources are not always targeted at the riskiest areas". When speaking at a recent Confederation of British Industry conference, the Chancellor concluded: "Over time this new model of regulation should not only apply the concept of risk to the enforcement of regulation, but also to the design and indeed to the decision as to whether to regulate at all."<sup>31</sup>
- 3.71** While it also might be argued that making amendments to the Guidance may be an appropriate way to resolve some of the issues we have outlined, we do not feel that, ultimately, this in itself will provide a proper and final solution. We have concerns, raised elsewhere in this report, about the fact that some local authorities appear to have knowingly, or otherwise, overlooked or possibly even set aside the Notes of Guidance as currently drafted.

31. Gordon Brown speaking at the CBI's Annual Conference, 28 November 2006. [http://www.hm-treasury.gov.uk/newsroom\\_and\\_speeches/chancellorsexchequer/speech\\_chx\\_281106.cfm](http://www.hm-treasury.gov.uk/newsroom_and_speeches/chancellorsexchequer/speech_chx_281106.cfm)

- 3.72 Ultimately what is required is consistency of approach, clarity and certainty for all those involved in this process, especially those who do not wish to break the law. This matter should not simply rest on whether or not someone takes legal action.
- 3.73 We believe that perfectly reasonable, harmless events of this kind have been negatively impacted upon, and that this has happened as a direct result of the lack of clarity in certain areas of the Licensing Act, and in particular through the lack of a proper definition of 'incidental music'.
- 3.74 Against this background we find it difficult to conclude other than that, as capably illustrated by the City of London Corporation, there are obviously circumstances where the *de minimis* nature of these kinds of live music events poses little, if indeed any threat at all, to the objectives of the Licensing Act 2003.

## **RECOMMENDATION**

(v) As a matter of some urgency a definition of 'Incidental Music' should be placed on the face of the Act. We would recommend that Part 2 – Exemptions, Paragraph 7 of Schedule 1 to the Act, where it relates to live music, is deleted and replaced with:

"The provision of entertainment consisting of the performance of live music is 'incidental' for the purposes of the Act when either it is not the primary reason for attending an event or venue, or the musical activity attracts less than 100 people."

### **Section 177 of the Licensing Act: Dancing and live music in certain small premises**

- 3.75 Section 177 of the Act provides, under certain circumstances, flexibility for unamplified live music. From what we have been told by both licensing officers and applicants, the current wording contained in the Act is convoluted and in many respects impenetrable. As a result of the complexity of language used we have yet to find a single example where this concession has been used either by licensing officers or venue owners.

3.76 If our understanding is correct, then the process would be as follows:

- (a) the venue would need to have a capacity of not more than 200 people;
- (b) the applicant would need to have appeared before a licensing committee, at a licensing hearing, and had conditions relating to live music attached to the premises licence at that hearing by that licensing committee;
- (c) if the premises were then to operate between the hours of 8:00 am and midnight, and were it to be providing unamplified live music;
- (d) then any conditions, relating to live music, attached to the premises licence, except those relating to public safety or the prevention of crime and disorder, by the licensing committee, at that licensing hearing, would have no effect and could simply be ignored by the venue operator.

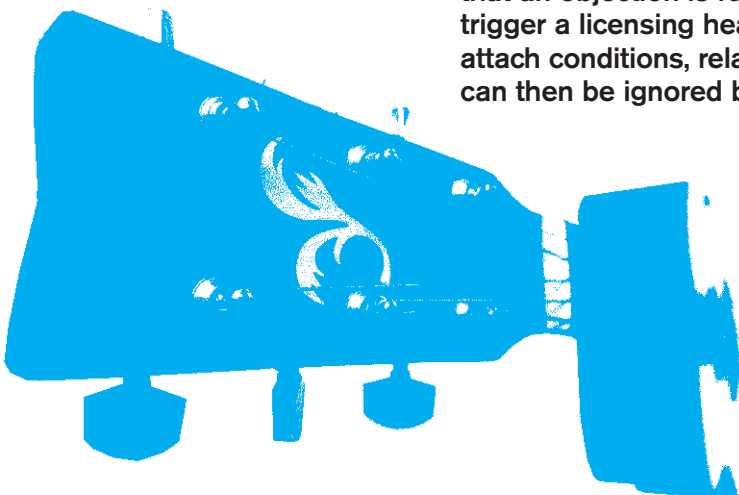
3.77 This would appear to be a quite extraordinarily complicated and wasteful process simply to arrive at, what is, ultimately, an exemption.

## **RECOMMENDATION**

(vi) Section 177, where it relates to the provision of live music, should be deleted from the Act and Schedule 1 Part 2 – Exemptions, should have a new Paragraph 7(a) inserted which should read:

“The provision of entertainment consisting of the performance of unamplified live music is not to be regarded as the provision of regulated entertainment for the purposes of this Act.”

3.78 It also, somewhat ironically, creates a process where it might be in the best interests of the applicant not to fully cooperate with the application process. The above exemption applies, and only applies, to conditions relating to public nuisance and the protection of children from harm attached to a premises licence by a licensing committee at a licensing hearing, and in no other circumstances. Therefore the possible objective of the applicant might be to ensure that an objection is raised to the application, which in turn would trigger a licensing hearing, at which the licensing committee would attach conditions, relating to the above licensing objectives, which can then be ignored by the licensee.



## Variation of Licence

- 3.79** It is a requirement of the Act that anyone with an existing Premises Licence who wishes to provide live music on a permanent basis, no matter how small or infrequent those events might be, must make a formal application to vary their original licence.
- 3.80** As the regulations currently stand, this in fact means repeating the whole application process – including the submission of a new application form, eight sets of plans, the application fee, and placing a newspaper advertisement, etc. The licensed trade has confirmed that an application to vary a Premises Licence specifically for live music would now incur average application costs in the region of £1,500.<sup>32</sup> For smaller licensed premises especially, this would obviously entail a considerable outlay. As is indicated in our case studies any outlay needs to be directly offset against any commercial benefit to the business.

### Case Study

A small restaurant in South London which seats around 40 people. In the past, and on a very occasional basis, live music was provided under the ‘two-in-a-bar’ rule as an accompaniment to dinner. The music was advertised by means of a chalk board on the pavement and a small notice in the window. General consensus would seem to suggest that in this case the advertising of the music would preclude it from qualifying as ‘incidental’.

Like a lot of licensees, the owner decided simply to transfer his existing licence during the transition period and apply for a variation to include live music “Once the dust had settled”.

Subsequent to acquiring his new Premises Licence the owner investigated the possibility of applying to vary his license, but decided that the investment needed to complete the application process was not commercially justifiable.

- 3.81** As the 2006 MORI research indicated, 61% of all licensed premises questioned (the majority with a capacity of less than 500), now have a licence to provide live music. Conversely, that of course means that 39% do not.
- 3.82** MORI’s research further indicates that throughout England and Wales about 39% of surveyed licensed premises which staged live music are micro venues (those with a capacity of less than 100 people). For a number of reasons these smaller venues are vitally important to the well-being and development of grassroots live music.

- 3.83** These smaller venues tend to super-serve some very dedicated audiences who would not normally be catered for by larger more mainstream outlets – blues, folk and jazz music, for example.
- 3.84** They also invariably provide the first opportunity for young musicians, artists and performers to gain their initial exposure to a live audience, where they begin to develop their talents and craft regardless of their ultimate ambitions. Simply put, there is no gig at Wembley in front of 100,000 people, having just sold 5,000,000 albums around the world, unless five years beforehand there was a gig in a little room in the back of a pub, club, hotel, bar or restaurant.
- 3.85** For tens of thousands of jobbing musicians these smaller venues provide the mainstay opportunity for weekly employment. It should perhaps be noted that the Musicians' Union calculate that 80% of musicians in the United Kingdom earn less than £15,000 per year, a substantial part of that income arising from performances in venues with a capacity of less than 100 people.
- 3.86** It is equally important to remember that in many rural areas smaller venues provide the only opportunity for local people to engage with and experience live music at a grassroots level whether in a village hall, community hall or village pub.
- 3.87** The requirement to repeat all the application process to obtain a licence for live music would appear to present a considerable and unnecessary regulatory burden. If real progress is to be made in encouraging some, or indeed any, of those 39% of smaller licensed premises currently not licensed for live music to vary their licence, then we can see no alternative but to reduce the burden of the application process. Is it really necessary, for example, to provide eight new sets of plans as part of the variation process if there has been no material change to the premises since it was originally licensed?



- 3.88 If Ministers are intent on achieving their publicly stated aim that the Act would lead to a growth in live music, and we interpret that to include the number of outlets for live music, not just the number of events taking place, then we feel that this barrier to entry needs to be removed.
- 3.89 In our view, there is a need to simplify many aspects of the application process, some of which are unnecessarily cumbersome and bureaucratic. Examples of issues that could be addressed include:
- considering whether placing a newspaper advertisement is really the most effective way of informing local residents of a pending variation request, when simply doubling the size of the “notice”, from A4 to A3 would provide interested parties with better notification of an application;
  - considering why the ‘notice’ has to be on blue paper;
  - giving greater thought to the exact nature of what is a ‘minor variation’, (there have been many examples of applicants volunteering as part of their application to limit the number of musicians performing to two, possibly in an attempt to replicate the old ‘two-in-a-bar’ rule. Why does removing that restriction now entail repeating the whole application process? and
  - introducing an exemption for *de minimis* live music events, which would immediately alleviate this unnecessary burden and instantly resolve many if not all of the negative impacts on this kind of event which we have already highlighted.

## **RECOMMENDATION**

(vii) That as part of DCMS’s ‘simplification plan’, Ministers should review the current variation system with the express goal of providing a simplified, fast-track licensing process which greatly reduces the burden placed on applications for live music especially for smaller premises.



## Licensing Authorities' Decisions

- 3.90** It is clear that the vast majority of licensing authorities have acted in a way that can only be described as reasonable and fair. One of the areas of our work which helped us greatly with this understanding was the systematic processing of Licensing Officers' reports, objection letters and minutes of every licensing hearing within particular licensing authorities. By way of example, the most common and widespread condition we have found attached to Premises Licences has been a simple requirement to "Keep the doors and windows closed" during times of regulated entertainment.
- 3.91** This process has however also exposed a number of local authorities which we feel have acted in a way that was disproportionate, heavy handed and interventionist. Local authorities which we feel have repeatedly and consistently, some as a matter of policy, imposed conditions which we believe were unnecessary and unreasonable.
- 3.92** There may be many reasons why these licensing authorities acted in this way, including: an overzealous interpretation of the Act; knowingly or otherwise setting aside the recommendations made in the Section 182 Guidance; possible political expediency; local councillors unwilling or unable to be seen not to be acting on behalf of what they perceive 'the voter' wants; potential loss of a traditional control mechanism; or perhaps, ultimately, fear of change itself.

### Case Study

The most extreme example we have encountered so far was a local authority in the Home Counties.

It is now apparent that as a matter of policy this authority decided to interpret the "Prevention of Public Nuisance", in its widest possible sense and to respond proactively to that goal. To date, and to the best of our knowledge, the Environmental Health department concerned has objected to a total of 54 applications for live music. We believe that none of these premises would previously have held a Public Entertainment Licence and would therefore have been engaging with a regulatory system for live music for the first time (around 69% of all premises which previously provided live music without a licence applied to do so under the new system). It would also appear that the Environmental Health department frequently raised objections to applications for live music when there were none from other parties, including local residents. We also have reason to believe that within this local authority, internal budgets were realigned to ensure that the Environmental Health department was fully resourced to carry out this task.

**3.93** Each of these 54 objections to applications led to a licensing hearing, and it is here that a particular pattern develops. In some extreme cases, applications for live music provision were refused entirely. In the majority of cases, however, applicants had conditions attached to their licence severely limiting the number of occasions live music could take place. This is illustrated by one recent application which had the following conditions attached to the licence:

- 1 There shall be no amplification of live music.
- 2 There shall be no more than 30 events per calendar year.
- 3 There shall be no more than two events per week.

**3.94** It is difficult to imagine exactly what kind of possible threat an unamplified musical instrument poses to any of the licensing objectives that would further require the total number of events to be limited in this manner.

**3.95** It would also be easy to suggest that this was simply a matter of some overzealous employees within a local authority. However, we feel it should also be remembered that each of the 54 applications appeared before a licensing sub-committee and each venue had these kinds of conditions attached to its Premises Licence by publicly elected local Councillors, not local authority staff.

**3.96** This was not an isolated case. Examples of other issues we have uncovered include:

**Council A:** of the 19 applications of which we are aware, which were considered by various licensing committees, 14 of the applicants were required to install noise limiters. And they all had, what would appear to be, a number of standardised conditions attached to their licences;

**Council B:** of the 18 applications of which we are aware, which appeared before licensing committees, 15 of the applicants were required to install noise limiters;

**Council C:** of the 22 applications of which we are aware, which were considered at licensing hearings, all had conditions attached severely restricting live music, such as, for example: "No more than two events per month";

**Council D:** developed a decision-making pattern which effectively prohibited all live music during the months of June, July and August, unless licensees installed air conditioning units;

**Council E:** overall, took a notably proactive stance, illustrated by conditions attached to a licence for a café situated in the local park. Conditions included that a noise limiter be installed (the café operates during normal park opening hours and therefore traditionally closes at dusk, and the nearest residential property is approximately 0.5 km away), and that: “The premises shall ensure that there is no audible noise or perceptible vibration transmitted through the structure of the premises which gives rise to a nuisance”. The café, which had previously provided live music under the ‘two-in-a-bar rule’, is not connected to any other buildings. It is also notable that there were no objections to the application from local residents;

**Council F:** on the topic of Temporary Event Notices, this local authority’s licensing policy statement makes it clear that: “The Council and the Police require written notice prior to the temporary event taking place. The Council requests a minimum of two months’ notice prior to the temporary event taking place.” And: “If the venue does not already possess a premises licence, or if the event involves a departure from the terms of the premises licence, the licensee should state in the operating schedule for the event to a degree proportionate to the nature of the event what measures are to be put in place to meet the requirements set out in policies LP1, LP2, and LP4-LP9 as applicable.”

- 3.97** These “LP” policies include what appear to be several pre-application demands of applications both for Premises Licences and TENs. For example, LP4 states that the application should identify which “Relevant licensable activities [are] to be undertaken at the premises or event, with a risk assessment in respect of these activities” and LP7 that: “The application should demonstrate that, between 11.00pm to 7.00am no noise is audible a metre from the façade of the nearest noise sensitive premises, or no noise is audible within the nearest noise sensitive premises.”

## Licensing Policy Statements

- 3.98** Questions need to be asked about the legality of such policies. This kind of information is simply not a legal requirement of the TENs application process, nor does this approach, for any licensing application, appear to be compliant with the *The British Beer and Pub Association & Ors v Canterbury City Council* High Court ruling which clearly stated that: “The licensing authority has no power at all to lay down the contents of an application” and that: “If a policy creates a different impression, and in particular if it misleads an applicant into believing that he must meet certain requirements in relation to his application”, then “the policy is contrary to the legislative scheme and is unlawful”.<sup>33</sup>

33. *The British Beer and Pub Association & Ors v Canterbury City Council* [2005] EWHC 1318 (Admin) (24 June 2005)

- 3.99** We have also reason to believe that this ‘Statement of Licensing Policy’ has been reviewed internally within recent months but in these respects remains unchanged.
- 3.100** As the Section 182 Guidance currently explains, TENs are “Characterised by an exceptionally light touch bureaucracy” and that “Many premises users given temporary event notices will not have commercial backgrounds or ready access to legal advice. They will include, for example, people acting on behalf of charities, community and voluntary groups, schools, churches and hospitals.” It further states that licensing authorities “Should strive to keep the arrangements manageable and user-friendly for these groups.” It would be questionable as to whether or not this local authority’s approach could be deemed to be manageable or user-friendly for any of the groups highlighted in the Guidance.
- 3.101** As the recent MORI research has indicated, 61% of all premises questioned (the majority with a capacity of less than 500) now have an authorisation for live music; of those, 35% had conditions attached to their licence in respect of live music. As indicated by these examples, some caution needs to be exercised in drawing any direct conclusions from this without asking the specific question: authorised to do what, when and under what circumstances?
- 3.102** In many ways it is fortunate that the majority of licensing authorities took a very different approach from the examples we have given; they are to be congratulated for their efforts. Thankfully this pattern of decision-making would appear not to have been widespread. It is understandable, however, that due to the behaviour of this minority of local authorities, many might question exactly which was the better of the two systems: live music as frequently as you wished under the ‘two-in-a-bar’ rule, or as many performers as you wish but no more than 30 times per year.
- 3.103** The only recourse now available to disappointed applicants is to seek redress through the appeals process, or through Judicial Review. As one applicant to whom we spoke told us: “At the end of the licensing process you are so emotionally ground down you simply want to get as far away from the whole thing as possible.”
- 3.104** We would ask Ministers to reflect on exactly what impact either the Section 182 Guidance in relation to live music, or possibly the legislation itself, had upon these licensing authorities and whether or not any amendments could be made to the Guidance which might encourage them to alter their chosen approach.

## ***RECOMMENDATIONS***

(viii) Ministers should take whatever action necessary to ensure that both the letter of the law and the spirit of the Section 182 Guidance is adhered to.

(ix) Ministers should robustly censure the small minority of those licensing authorities which, knowingly or otherwise, have developed repeated patterns of heavy handed, negative decision-making which are contrary to both the letter of the law and the spirit of the Section 182 Guidance.

(x) The House of Commons Select Committee for Culture, Media and Sport should consider whether they wish to look at those licensing authorities which, knowingly or otherwise, have developed repeated patterns of heavy handed, negative decision-making and those local authorities which appear to be operating under Licensing Act Policy Statements which contradict both the letter of law and the subsequent 2005 High Court ruling (see paragraph 3.98).

(xi) Ministers should put in place a system, in conjunction with the industries and local government, which allows for the periodical review of decision-making patterns within a sample of licensing authorities, to ensure that there can be no repeat of this form of unnecessary and unreasonable cumulative impact.



## Review of Licences

- 3.105** Currently there are four separate pieces of noise legislation which have the ability to impact upon the performance of live music: The Environmental Protection Act 1990; the Noise Act 1996; the Clean Neighbourhoods and Environment Act 2005; and the Licensing Act 2003. Each of these Acts has differing goals and procedures for meeting their objectives.
- 3.106** In dealing with any potential noise nuisance, the Environmental Protection Act places a requirement upon local authorities to issue a Noise Abatement Notice if they are satisfied that a statutory nuisance exists or may occur or recur. However, traditionally the Courts have demanded that local authorities are able to substantiate evidentially that there is, was or could be a reoccurrence of any noise nuisance. The Noise Act and the Clean Neighbourhoods and Environment Act provide, in turn, a permitted level for noise in residential properties between the hours of 11pm and 7am the following morning, above which any noise nuisance would be an actionable offence. In each of these circumstances there exists a clear burden of proof, evidence that a nuisance actually has been, is being or may be caused. The Licensing Act 2003, on the other hand, has no such burden of proof and as we have already illustrated, some local authorities have interpreted this in a way which has been detrimental to live music.
- 3.107** The provisions and powers of the Noise Act and the Clean Neighbourhoods and Environment Act are, we believe, optional for local authorities; in essence, they have the discretion to chose to exercise their additional powers or not. In relation to noise from licensed premises, the provisions of the Clean Neighbourhoods and Environment Act exclusively apply during the hours of 11pm to 7am the following morning. Similar provisions exist under the Noise Act. In practice, of course, this places a budgeting cost requirement upon local authorities who might wish to provide an 'out of hours' service for local residents. As a survey conducted in 2003 by Temple Environmental Consultants indicated, only 8% of the responding local authorities had adopted the Noise Act, with an additional 25% prepared to adopt the legislation if the mandatory requirement for a 24 hour/seven day noise service was removed.<sup>34</sup>
- 3.108** While it is too early to provide a full assessment of the dynamic between these various pieces of legislation, it is a concern that some local authorities may decide to use the Licensing Act as their primary means of dealing with any noise control issues. We are aware of one or two examples of where this may have already taken place.

34. [http://www.templegroup.co.uk/news/10/Noise\\_Management\\_July\\_2003.html](http://www.templegroup.co.uk/news/10/Noise_Management_July_2003.html)

3.109 It would appear that this relationship may also give rise to very different approaches being taken by other agencies, both nationally and locally.

3.110 Recent guidance issued by the Department for Environment, Food and Rural Affairs in conjunction with the Chartered Institute of Environmental Health, provides policy and good practice examples for local authority Environmental Health officers. It includes advice on how Environmental Health officers, as 'Responsible Bodies', might approach the Licensing Act application and review process. This guidance includes the following statements: "The following matters will need to be considered in making the assessment [of an application]", that "An electronic sound cut-out or compressor/limiter device will be required for most premises in close proximity to residential or noise sensitive premises", and that "Smaller venues that require extensive insulation works may be considered as unsuitable for the purposes of entertainment." It is possible that this guidance, at least in its current form, may provide some tension with the Guidance issued by DCMS under Section 182 of the Licensing Act. Adopting a strict interpretation of this last statement might, for example, preclude a very large percentage, if not in fact the vast majority, of traditional pubs throughout England and Wales, from hosting live music events.

## ***RECOMMENDATIONS***

(xii) Ministers should give further consideration as to how best to ensure that all relevant Government Departments and other agencies are fully participating in key policy objectives, and that all internal and external communications and guidance share any common priorities.

(xiii) We also recommend that monitoring of the Licensing Act Review process should continue so that a fuller assessment can be made in the future of any possible impacts. Ministers may wish to use the opportunity provided by the 2007 repeat live music baseline study as an initial step in beginning this process.